# CONTESTED ELECTIONS.

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IT IS easier to find fault than to find a remedy; and yet finding fault is the essential prerequisite to any remedy whatever. If, therefore, this article seems to more vigorously complain of existing abuses than to clearly show how those abuses can be speedily remedied, it must be charged to the nature of the case, and not to any doubt that the abuses need remedy.

The Constitution prescribes that each house of Congress shall be the judge of the elections, returns, and qualifications of its own members, and under that clause the House of Representatives is the final tribunal for the decision of contested-election cases. It cannot divest itself of its power in that regard, and has not the same freedom to make laws upon the subject which is enjoyed by the British House of Commons. This power of final decision as to its membership became vested in each house from causes which were entirely natural. We embodied in our Constitution the English idea, and that idea had its origin in the fact that in the earlier days there was no other place to lodge so great and essential a power. The crown could not have it, for the House of Commons often represented a people entirely antagonistic to the king, and always a people who on some points differed from him, and whose control over taxation could not be suffered in any way to be taken from them. The power could not be vested in the judges, for in those days the judges were but representatives of the king himself, doing his work by his appointment and holding office at his will. Hence there was in early days no place where the right to judge of the elections could be lodged except with the elected body itself.

Of course there was always a possibility that the elected body

might find itself in the position of the House of Representatives which was electrified by the statement of John Quincy Adams that he would put the vote himself. At that time the mere clerk of the former House had assumed to pass in a preliminary way upon the right of members to their seats. And to-day at the opening of each Congress we have the anomaly of a clerk of a House which has ceased to be, calling to order the House that is to be, and determining the membership of that House for the purposes of organization, with all that that implies. Whatever doubts there may be as to the power of any law to so order the organization of the House of Representatives, the law has thus far been acquiesced in because of the fear that any other course might lead to chaos. It is true in theory that the House, upon organization, may at once proceed to correct all the mistakes and usurpations of the clerk; yet, in fact, such mistakes and usurpations having been committed in the interest of a party and for the very purpose of putting that party in power, he would be a sanguine man indeed who hoped to see a wrong repudiated which was thus premeditated and profitable. If the members of a court of law, grave and reverend, can almost always find reasons for deciding either way, a mere politician would hardly be at a loss for excuses in time of political stress.

Prior to the year 1770 the House of Commons determined its election cases as party questions by a vote of the whole House, and on most occasions little attention was paid to the views entertained by the constituents or to the votes they might have given. In one instance the party element in the decision was so pronounced that the ministry resigned because they were beaten in an election case. This system is largely our own to-day, and brings back to memory the reply of Mr. Robinson, of Massachusetts, then Representative and afterwards Governor, when asked what were party questions. "I know of none," said he, "except election cases." The Governor's epigram, though not absolutely accurate as fact, describes the attitude of the House towards election cases. It is an attitude which has so much of human nature in it that nothing will ever change it in the vast majority of cases. Men have no time to examine evidence, and no inclination. To conceive anything more dreary than would have been the task of examining the evidence before the present House surpasses human imagination.

Think of reading, amid intervals of letter-writing and errand-doing for constituents, fifteen thousand pages of evidence as a preliminary to the perusal of the arguments of counsel learned in the law. Think of the weary hours and the aching eyes; and think also how little time would be left for even that attention to other public business which we really have to give not merely to save the country, but to keep the constituents in reasonable humor. However often the fervid eloquence of some member who has read the evidence may exhort us to act as "judges and not as partisans," we are utterly unqualified to do so, and utterly incapable. Whether prior to 1770 the English House had the advice of a committee who had examined the case, I do not know, but I should judge from all the accounts that they proceeded upon knowledge which must have been very general. In the American House all the cases are examined by a committee, and are really examined with much care and in a most exhaustive manner. Nevertheless, the committee usually divide on the line of party, when they divide at all, and the House usually follows in the same way. To any thinking man this is entirely unsatisfactory. The decision of election cases invariably increases the majority of the party which organizes the House, and which herefore appoints the majority of the Committee on Elections. Probably there is not a single instance on record where the minority was increased by the decision of contested cases.

It is not the intention to assert that the majority of the Committee on Elections is always followed in servile fashion by the majority party. But the exceptions are sometimes more ludicrous commentaries on the House system than the regular cases. One case can be called to mind, not twenty years ago, where all the testimony except the member's own declaration seemed to show that he had not been naturalized. But the question got into such shape that a decision adverse looked like a decision that no man could be regarded as a naturalized citizen who had lost his certificate. As soon as that happened, it was amusing to see how men in districts full of adopted citizens rose above party and blossomed into language of the loftiest and most disinterested non-partisanship. If the member had not been naturalized by the courts, he soon was by the House of Representatives itself, and by a large majority. Not only are the decisions of contested-election cases very unsatisfactory, but they consume the

time of the House to the exclusion of valuable legislation. Each case takes from two to five days for discussion. While the discussions are for the most part able, and cost those who speak much time and long-continued effort, they are never listened to by even a third of the members; for, knowing nothing of the testimony, the members can see but little of the bearing of what is said. Sometimes, of course, though rarely, the case may turn upon some single principle or upon some great central facts. In that event the House may become deeply interested, and may even take the case into its own hands for decision. Such instances are rare, and the incoming of an election case is a leave-of-absence for three-quarters of the House.

The methods of taking testimony are very tedious and exasperating. Each party is limited as to time, and has to take his testimony in writing before magistrates, and sometimes must have a score of lawyers obtaining evidence in different places at the same moment. There is but little to restrain partisanship, and nothing to keep the lawyers within any limits. Everything is dragged in which the whim of a lawyer may call for. You can object, to be sure, but the testimony goes in just the same, and is printed just the same; and you must make answers to it, however irrelevant you may deem it and however wasteful it may be of your time. So great at one period became the expense to the government that a law was enacted, which is still in force, that only $2,000 should be granted to any contestant or contestee to pay his expenses. If he spent more, it must be out of his own pocket. This law has worked very grave injustice, for the range of testimony is not within the control of the parties to the contest. They must each meet the attacks of the other, and each must prove his case exhaustively. In the somewhat celebrated case of Governor Curtin and Mr. Yocum, even after the passage of this law, both parties were paid $8,000 each, and that sum did not pay their expenses within thousands of dollars. In that Congress (the Forty-sixth) $59,567 was paid to members and contestants, and in the next Congress $71,285 was the large total; twenty-four men receiving the full amount allowed by law and two members $3,500 each. During the last eight Congresses $318,000 has been paid for contests in the House, making an average of about $40,000. Large as is this expenditure, it is not large enough in reality, if the present system is to be maintained; for the restriction to $2,000 is very hard

upon contestants of limited means. If they enter upon a contest, especially in the midst of unfriendly officials, as is the case in some districts, no one can tell where the expense may end. In fact, it may be doubted if the restriction was not suggested and put on with that view, though it is very certain that the Congress which passed the law did not appreciate what it was doing.

It may be asked why men should be paid at all for struggling for a place which will belong to the one who gets it. Why should the people be taxed to determine which of two men shall have $5,000 a year? It is precisely because it so much concerns the people to determine who is to rightly represent them that even money becomes of no consequence. In truth, to determine who shall so represent them is the cause of all elections, the reason itself of all the turmoil we make and the expense we incur. When we say of the man who is elected, but is defrauded of his seat, "This is his affair alone," we make office a private perquisite, and not a public duty. So much, indeed, is the public concerned that it has always been deemed worth while to pay the expenses of both sides so that the truth may not fail to be brought out. If, then, we are to pay at all, we must pay all it costs. And if it costs too much, we ought to devise some plan to lessen the cost.

What our present system costs in the time of the House has already been adverted to. It would be difficult, without much labor, to state exactly in days how much time is consumed each session in arriving at our very unsatisfactory conclusions; but the nine cases decided thus far in the present House have consumed sixteen days, or more than one-ninth of the time of the session. Of these nine cases, it must also be borne in mind, the reports in three were in favor of the sitting members; two of these excited no debate, and the other consumed but part of one day. In the Fiftieth Congress four cases took nine days, and in the Forty-eighth thirteen days were consumed by six cases. It may be safely said that more than two days of the House on an average are spent on each contest.

The fault of unsatisfactory results does not rest on the committees. Some of the best men of the House have been on the Committee on Elections. As to the members of the present Committee on Elections, it might not transcend the agreement of all if it should be said that they are a set of men whose character,

ability, legal knowledge, and uprightness it would be difficult to surpass, or perhaps parallel, in this or any other House. Yet whenever the decision has been against the sitting member, the division has been upon party lines; and whenever the two wings of the committee have agreed in favor of the sitting member, it has always, or almost always, been on different grounds. Of course this sharp line of demarcation may in some measure be caused by the strong party feeling which has prevailed during the session. Nevertheless, in other years there have been similar results.

To sum up the whole situation, it may be said that our present method of determining election cases is unsatisfactory in results, unjust to members and contestants, and fails to secure the representation which the people have chosen. In addition, it is costly to both the parties interested and to the people of the country, and is costly not only in money from the treasury, but in the time of the legislative body.

In England, in 1770, the system of determining election cases by a vote of the House had caused so much dissatisfaction that George Grenville proposed that the final determination of each case should be left to a jury of members chosen by lot, and Parliament agreed to the plan. After a time, by a change of the law, thirty-three men were chosen by ballot, and from this list of thirty-three, eleven names were stricken off by each party, and the case was decided by the remaining eleven. These methods of deciding, though there was still great complaint, worked in a manner much more satisfactory than the decision by the full House, and continued in vogue until 1839, when the dissatisfaction broke out again, and a bill was introduced by Sir Robert Peel increasing the power of the committee and also its responsibility. This bill became a law. Notwithstanding Sir Robert Peel's sanction, which, from his experience and unrivalled parliamentary knowledge, might have been deemed a sure guarantee of the efficacy of the law, it was repealed after a trial of only two years. In 1848 the House transferred its entire authority to the Committee of Elections, which was composed of six gentlemen appointed by the Speaker by his warrant, but subject to the approbation and sanction of the House. These gentlemen acted under oath and were men of the highest standing and attainments. Nevertheless, the Chancellor of the Exchequer, in 1868, was forced to say that "that tribunal

had not proved satisfactory": expenditures had increased; corrupt practices had not declined; the decisions had been uncertain and contradictory. From all this the Chancellor inferred, and the House was of the same opinion, "that there is something in the principle upon which the jurisdiction of the House in regard to controverted elections rests which is essentially vicious." Acting upon this opinion, it was determined to free the decision of contested-election cases from all Parliamentary entanglements; to take them from the hands of the unprofessional men who could only hear testimony and could not preserve continuity of principle or plan of action, and place them in the hands of the judges, who could and would establish plans for determining the facts and principles of law which should guide their decision of the cases. It was further provided that the judge in charge of the case should, if he saw fit, investigate the election where it took place and determine the facts on the spot. This system has been in operation for many years and has worked well. The judges who have charge of these cases were selected under the law of 1868, one from each of the great divisions of the Law Courts, Queen's Bench, Common Pleas, and Exchequer, and others were added to the list if the number of the cases required it. One judge without a jury sat in each case.

It will be seen that there are many difficulties in the way of our following the example of Great Britain. Parliament is a constitution unto itself. It can divest itself of any of its powers. Nothing but a constitutional amendment, ratified by three-fourths of all the States, could place the House of Representatives in the same position. We could not divest ourselves of our right to be the judges of elections, even if we would. Nor would any statute enacted by both houses serve the purpose. The election-contest laws which we have now do not bind us except by our own consent. Yet in practice they do bind us; and here may be the solution of our difficulties. There is probably no doubt that, if some tribunal were selected by Congress and its decisions were acquiesced in for a few years, there would spring up such a consensus of opinion that ever afterwards the House would cease to do more than record the decisions of the tribunal established in part by itself, or, to speak more accurately, by its predecessor and by Congress. Any law which made the decision *primâ facie* would certainly be respected and would certainly work the cure.

The determination as to what tribunal should be taken is by no means free from difficulty. When in 1868, as has been said, it was resolved by Parliament to divest itself of all authority as judge of the election of its own members, the Select Committee of a previous year, composed of very eminent men who had given the subject much consideration, were decidedly of the opinion that no less a tribunal than Her Majesty's judges would serve the purpose or be august enough to be the substitute for the House of Commons. Accordingly, the government had promised to bring in a bill with that provision therein. The judges were communicated with in order to obtain from them any suggestions they might wish to make as to the details of the measure which was to confer upon them this new power and exact from them this new duty. Somewhat to the surprise of the government, the judges did more than respond to the inquiries made of them, and volunteered the suggestion that they did not wish to have the power or to perform the duty. The debate in Parliament does not disclose the communication made by the judges, nor exactly define the grounds of their objection; but I infer that they had a natural fear that, if they became involved in transactions relating to party politics, even if the question to be determined was one of law and fact simply, their usefulness in the discharge of their general duties might be impaired. Though this objection has some force, and was so treated, Parliament seems to have finally determined that, without impairment of their usefulness elsewhere, the duty of determining contested-election cases might well be devolved upon the judges.

This objection would be urged in the United States against any tribunal which could be selected among those now in existence. But such an objection would not exist in practice. The true safeguard against partisanship and against the charge of it would be the openness and necessary publicity of all the proceedings. It is easy enough for a man to be a partisan, surrounded, supported, and sustained by others who act with him; but on the bench, alone by himself, face to face with the community, a judge would be true to his duty and true to his office.

There is one danger, that of undue influence, which would arise from the relations which a judge has with the community in which he lives. We are none of us isolated in this world, and it is doubtful whether we would become better judges if we were.

Nevertheless, there are influences which ought to be guarded against. If it were possible to detail judges of rank corresponding with those selected in England, it would be fortunate for us beyond a doubt. If the Supreme-Court judges could try such cases, their high character and sound learning would not only be a safeguard in themselves against injustice, but would inspire that confidence which is half the battle. But with the present number of judges and the volume of work imposed upon them, such detail would not be practicable, even if there were no other objections.

There remain the circuit and the district judges. The latter would have the advantage of being upon the spot, of having familiarity with the ways and manners of the people immediately concerned, and could perhaps make the needed examination into the cases with less waste of time than any one else. The objection would arise from the possibility of undue local influence. By this is not meant, of course, any influence of which the judge would be conscious. But the desire to be well with one's neighbors is one of the most powerful controllers of men.

If the new bill to relieve the Supreme Court, which has already passed the House, should pass the Senate and become a law, there would be a large number of circuit judges, and from that number three or six, or even more, could be detailed to act as judges of elections of members of Congress. Each judge could take testimony, make investigations on the spot, and pronounce his opinion, which could certainly be made *primâ facie,* and which the House would not be likely to disturb.

Such a tribunal, empowered to make rules and regulations, and to establish in the light of growing experience rules of evidence which should be applicable to contested-election cases, would save much cost of money and spare much time of the legislative body, and give the country assurance of sound and safe decisions on the very vital question as to who have been chosen to make the laws and direct the fortunes of the Republic.

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